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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Tehama)

THE PEOPLE, Plaintiff and Respondent, v. MARTIN RODRIGUEZ DIAZ, JR., Defendant and Appellant.	C094759 (Super. Ct. No. 21CR000698)

Defendant Martin Rodriguez Diaz, Jr., pleaded guilty to child abuse, resisting an executive officer, and battery with serious bodily injury; he received a seven-year eight-month sentence, which included an upper term on the child abuse count.

In light of recently enacted Senate Bill No. 567 (2021-2022 Reg. Sess.) (Stats. 2021, ch. 731, § 1.3) (Senate Bill No. 567), defendant appeals his sentence, contending the imposition of the upper term does not satisfy the new requirements of Senate Bill No. 567. We shall vacate the sentence and remand for resentencing.

BACKGROUND

The parties stipulated that the facts from the probation report formed the factual basis for defendant's plea. In summary, an officer confronted defendant regarding an outstanding warrant and defendant dropped his child to the floor during a struggle with two more arriving officers. Defendant struck one officer in the face and a second officer sustained a knee injury.

In July 2021, defendant pleaded guilty to child abuse (Pen. Code, § 273a, subd. (a)),[1] resisting an executive officer (§ 69), and battery causing serious bodily injury (§ 243, subd. (d)) in exchange for dismissal of the remaining charges and a charge in a separate case; the parties agreed defendant's sentence would not exceed seven years eight months. The trial court sentenced defendant to an aggregate term of seven years eight months in prison that included a six-year upper term for child abuse.

Defendant's probation report summarized the police report and concluded defendant made credible, lethal threats to law enforcement and he likely traumatized his young child. The report speculated that one of the officers might never fully recover from his knee injury and concluded defendant was a threat to the community and should be committed to state prison. The report also stated defendant has a history of violent behavior and his conduct in the underlying crime was "extreme." The report identified five prior convictions, including misdemeanors.

During sentencing, the trial court indicated it read and considered the probation report, statement in mitigation, and oral argument. With respect to imposing the aggravated sentence, the court noted defendant's "prior record shows a history of violence, poor performance on probation, all of which support the maximum term." No certified records were presented.

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[1] Undesignated statutory references are to the Penal Code.

Defendant timely appealed. Briefing was completed on April 12, 2022, and the case was assigned to this panel on April 14, 2022. The parties waived argument and the matter was deemed submitted on June 17, 2022.

DISCUSSION

Defendant contends the trial court erroneously imposed the six-year upper term for his child abuse conviction. Specifically, defendant claims Senate Bill No. 567 applies retroactively, and the proper remedy is to remand for resentencing. The Attorney General agrees with the first claim but argues remand is not required.

When the trial court sentenced defendant, former section 1170 provided that when a judgment of imprisonment is to be imposed and the statute authorizes three potential terms, "the choice of the appropriate term shall rest within the sound discretion of the court." (Former § 1170, subd. (b); Stats. 2018, ch. 1001, § 1.) Senate Bill No. 567 amended sections 1170 and 1170.1 to limit the trial court's discretion to impose the greater term. As relevant here, the bill limited the trial court's discretion to impose a sentence greater than the midterm unless the aggravating factors justify doing so and the facts underlying the circumstances have been stipulated to by the defendant or found true beyond a reasonable doubt. (§ 1170, subd. (b)(1) & (2), as amended by Stats. 2021, ch. 29, § 15.) On exception is that the trial court may rely on certified records of conviction to find a prior conviction proven. (§ 1170, subd. (b)(3).)

We agree with the parties that the amended section 1170, effective January 1, 2022, applies retroactively as an ameliorative change in the law that is applicable to all nonfinal convictions. (*People v. Flores* (2022) 73 Cal.App.5th 1032, 1039.)

It is undisputed that the trial court did not have the benefit of these amendments at the time it sentenced defendant to the upper term. However, in cases where there is no reasonable doubt but that the same result would have been achieved if applying the newly amended statute, this error may be construed as harmless. (*People v. Lopez* (2022) 78 Cal.App.5th 459, 465 [where a sentencing factor must be found true by a jury and the

court fails to ensure that it is, the error does not require reversal if determined on appeal to be harmless beyond a reasonable doubt, applying the test set forth in *Chapman v. California* (1967) 386 U.S. 18].) Application of this test requires us to examine whether the " 'evidence supporting that factor is overwhelming and uncontested, and there is no "evidence that could rationally lead to a contrary finding." ' " (*Lopez,* p. 465.) "[T]o conclude that the trial court's reliance on improper factors . . . was not prejudicial, we would have to conclude beyond a reasonable doubt that [the judge in this court trial] would have found true beyond a reasonable doubt *every factor on which the court relied*." (*Id.* at pp. 465-466, italics added.)

The Attorney General argues the error was harmless because "a jury would have found at least one of the aggravating factors relied on by the trial court to be true beyond a reasonable doubt." However, as we have just explained, that is not the proper test for the error at issue here, where the new law specifically requires that *all* factors relied upon be proven by the heightened standard. Further, where, as here, *no* required evidence supported the assertions in the probation report, we decline to find that even one of the aggravating factors would necessarily have been properly proven, as we decline to presume the existence of extra-record evidence.

Nor do we agree with the Attorney General that merely because the aggravating factors were factors related to defendant's criminal history, which was set forth in the probation report, a different standard of review applies. Although we agree with the Attorney General that review under *People v. Watson* (1956) 46 Cal.2d 818 may also be an integral part of our analysis (see *People v. Lopez, supra,* 78 Cal.App.5th at p. 467, fn. 11), we cannot accept the Attorney General's argument that the trial court should be entitled to rely on a probation report in lieu of a certified record merely because of the assumption that the information was "readily available from official records." This argument would undermine the specific language of Senate Bill No. 567 and amended sections 1170 and 1170.1. Under section 1170, subdivision (b)(3), the court may

consider prior convictions only if presented with a certified copy of the record of conviction. A probation report is not a certified copy of the record of conviction. (See Evid. Code, §§ 452.5, subd. (b)(1), 1530, subd. (a)(2).) Given the precise language of section 1170, we reject the argument that the trial court could harmlessly rely on information from defendant's probation report to impose the upper term.

Consequently, we vacate the sentence and remand for the trial court to resentence defendant in a manner consistent with the amended section 1170, subdivision (b). The court is directed to conduct a full resentencing. (See *People v. Buycks* (2018) 5 Cal.5th 857, 893.)

DISPOSITION

The conviction is affirmed. The sentence is vacated and the matter is remanded for a full resentencing, applying section 1170 as amended by Senate Bill No. 567 and related legislation.

/s/
Duarte, J.

We concur:

/s/
Hull, Acting P. J.

/s/
Renner, J.